

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

CP SOLUTIONS PTE, LTD., :  
a Singapore corporation, :  
 :  
Plaintiff, :  
 :  
vs. : No. 3:04cv2150 (JBA) (WIG)  
 :  
GENERAL ELECTRIC COMPANY, :  
ET AL., :  
 :  
Defendants. :  
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**RULING ON PLAINTIFF'S MOTION FOR EVIDENCE PRECLUSION OR,  
IN THE ALTERNATIVE, MOTION TO COMPEL [DOC. # 43]**

Pursuant to Rule 37(a), Fed. R. Civ. P., and D. Conn. L. Civ. R. 37, Plaintiff, CP Solutions PTE, LTD., has moved for an order prohibiting Defendants from using any documents not produced in their initial document disclosure under Rule 26(a)(1)(B), Fed. R. Civ. P., or, in the alternative, for an order compelling a supplemental production and supplemental responses to Plaintiff's Request for Production of Documents, Set No. One. For the reasons set forth below, Plaintiff's Motion for Preclusion will be denied, and Plaintiff's Motion to Compel will be granted in part and denied in part. A decision on the issue of attorney's fees and monetary sanctions will be reserved.

**Discussion**

This lawsuit arises out of an alleged business relationship between Plaintiff, Defendants, and an entity known as Tru-Tech

Electronics, involving Plaintiff's procurement of component parts from Tru-Tech for Defendants' use in the manufacture of electrical products. Plaintiff's action, which sounds in contract and fraud, seeks over \$40 million in damages.

The instant discovery motion was precipitated by Defendants' production of 301,539 pages<sup>1</sup> of documents in response to Plaintiff's 131 requests for production of documents. Plaintiff describes this massive production as "dump truck" discovery tactics, engaged in by Defendants in an effort to hide the proverbial "needle in the haystack." On the other hand, Defendants respond that their document production was narrower than the information sought by Plaintiff's voluminous, wide-sweeping document demands, and that Plaintiff cannot point to a single non-responsive document that was produced. As required by the Local Rules, counsel for both sides have met and conferred, albeit unsuccessfully, in an effort to resolve their differences on this discovery dispute.

#### **I. Plaintiff's Motion to Preclude**

Initially, Plaintiff maintains that Defendants should be precluded from using any of these 300,000+ documents that were not produced as part of their initial disclosure under Rule 26(a)(1)(B), Fed. R. Civ. P., pursuant to which Defendants

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<sup>1</sup> Defendants claim that Plaintiff's figure is exaggerated since many of the documents are e-mails disseminated to a large number of people, which resulted in duplication.

produced only 105 pages of documents. Relying on the language of Rule 37(c)(1), Fed. R. Civ. P.,<sup>2</sup> Plaintiff argues that, unless the non-disclosure was harmless or excused by substantial justification, this Court must preclude the use of these additional documents at trial.

Rule 26(a)(1) provides in relevant part

[A] party must, without awaiting a discovery request, provide to other parties:

(B) a copy of, or a description by category and location, of all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment.

Under subsection (E), this initial disclosure must be made "based on the information then reasonably available to [the disclosing party]," and a party is "not excused from making its disclosures because it has not fully completed its investigation of the case." Rule 26(a)(1)(E), Fed. R. Civ. P. The disclosing party, however, does not have to produce actual documents. It can

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<sup>2</sup> Rule 37(c)(1), Fed. R. Civ. P., provides in relevant part:

A party that without substantial justification fails to disclose information required by Rule 26(a) . . . is not, unless such failure is harmless, permitted to use as evidence at trial, at a hearing, or on a motion any . . . information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. . . .

comply fully with its initial disclosure obligation by providing a description by category and location of all documents, data compilations, and tangible things it expects to use during the proceeding. Rule 26, Fed. R. Civ. P., Advisory Comm. Notes, 1993 Amendments; 6 James W. Moore, Moore's Federal Practice § 26.22[4][c][iii] (3d ed. 2005); 7 Moore's Federal Practice § 37A.21[1]. Furthermore, under the 2000 amendments to Rule 26(a)(1)(B), which eliminated the requirement to disclose information "relevant to disputed facts alleged with particularity in the pleadings," the disclosing party is only required to disclose matter that is favorable to it and that might be used to support its claims or defenses. 7 Moore's Federal Practice § 37A.21[1]; 6 Moore's Federal Practice § 26.22.

Plaintiff's motion to preclude is premised solely on the assumption that all of 300,000+ documents should have been produced as part of the mandatory initial disclosure under Rule 26(a)(1). That assumption is not necessarily true. Plaintiff has failed to cite to a single document that Defendants failed to produce initially that was reasonably available to them and that they would use in support of their claims and defenses, and not for impeachment purposes. See generally, 7 Moore's Federal Practice § 37.60[2][a]. Thus, based on the moving papers, the Court is unable to find that there has been a violation of the initial disclosure requirements of Rule 26(a)(1).

Additionally, while the language of Rule 37(c)(1) and the Advisory Committee Notes support Plaintiff's argument that preclusion is not only mandatory but self-executing, the courts have generally exhibited a reluctance to impose preclusion as an automatic sanction for a violation of the initial mandatory disclosure requirements of Rule 26(a)(1). See Equant Integrations Services, Inc. v. United Rentals (North America), Inc., 217 F.R.D. 113, 118 (D. Conn. 2001) (holding that "preclusion is a drastic remedy" and it is "generally ordered only where the court finds that the party's failure to comply with the requirements was both unjustified and prejudicial"); Hinton v. Patnaude, 162 F.R.D. 435, 439 (N.D.N.Y. 1995) (holding that the imposition of preclusion as a sanction under Rule 37 is a drastic remedy and should only be applied in those rare cases where a party's conduct represents flagrant bad faith and callous disregard of the Federal Rules of Civil Procedure); Newman v. CHS Osteopathic Inc., 60 F.3d 153, 156 (3d Cir. 1995) (holding that "even under Rule 37, the imposition of sanctions for abuse of discovery . . . is a matter within the discretion of the trial court," and finding that the district court did not abuse that discretion in refusing to exclude testimony of two witnesses who were not named in self-executing disclosures); see generally 7 Moore's Federal Practice §§ 37.60[2][b] & 37.61. Even in Yeti By Molly Limited v. Deckers Outdoor Corp., 259 F.3d 1101, 1106 (9th

Cir. 2001), relied upon by Plaintiff, the Ninth Circuit gave "wide latitude to the district court's discretion to issue sanctions under Rule 37(c)(1)," and recognized that the harshness of the mandatory sanction provisions under Rule 37(c)(1) was ameliorated by two express exceptions set forth in the Rule - i.e., if the parties' failure to disclose was substantially justified or if it was harmless.

This case is still in the discovery phase, and the disputed documents were ultimately produced. As set forth above, the Court is unable to conclude that there was a violation of the mandatory disclosure provisions of Rule 26(a)(1), and, even if there were, the Court finds that preclusion is too harsh a remedy to be imposed under the circumstances. Accordingly, the Court denies Plaintiff's Motion for Evidence Preclusion of All Documents Not Previously Produced in Defendants' Initial Disclosure.

## **II. Plaintiff's Motion to Compel**

More problematic is Plaintiff's motion to compel, which asks the Court to order Defendants (1) to supplement its production so as to identify every document which is responsive to each of Plaintiff's requests for production; (2) to organize and label each responsive document to correspond to the categories of Plaintiff's requests; and (3) to produce the "native" or "original" electronic documents identified as "Personal Folder

Files" ("PST files") which, Plaintiff alleges, underlie the hundreds of thousands of pages of e-mails and accompanying attachments comprising Defendants' production "as they are kept in the normal course of business."<sup>3</sup> Plaintiff asserts that due to the volume and disorganized state of Defendants' production, Defendants should be required to organize and label the documents produced to correspond to Plaintiff's requests for production. More specifically, Plaintiff complains that thousands of e-mails were separated from their attachments, thousands of pages of "gibberish" were produced, and documents were commingled and, thus, were not produced as kept in the ordinary course of business.

Defendants respond that all electronic documents were produced in TIFF format ("Tagged Image File" format), which is essentially a "picture" of the document. (Monteleone Aff. ¶ 6.) Additionally, Defendants provided Plaintiff with a CD of all the documents, which should have allowed Plaintiff to import the data into its computer database. Using Plaintiff's litigation support software, Summation, Defendants state that Plaintiff should have been able to sort the documents by electronic ID numbers, which would have revealed the e-mail/attachment relationship. (Monteleone Aff. ¶ 7.) Defendants maintain that, following

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<sup>3</sup> Plaintiff claims that the PST files, as they are kept in the ordinary course of business, would drastically reduce the time needed to prepare an index of Defendants' documents.

several meetings between their IT personnel, it was their understanding that all issues regarding the e-mail attachments had been resolved. (Monteleone Aff. ¶¶ 9-11, 15.)

Rule 34(b), Fed. R. Civ. P., provides that "[a] party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize them and label them to correspond with the categories in the request." (Emphasis added). Rule 34(b) clearly provides two alternative options for complying with a document production request. Defendants, having chosen to produce the documents as kept in the ordinary course of business, do not need to categorize them or label and organize them to correspond to specific requests for production. On the other hand, having made that choice, the Court will require Defendants to re-produce some of the documents in the manner kept in the ordinary course of business.

First, with respect to the thousands of pages of unreadable "gibberish" produced by Defendants, Defendants state that this was caused by a software incompatibility problem and that the problem cannot be cured by "re-producing" the documents in PST files.<sup>4</sup> Additionally, they maintain that this is the manner in

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<sup>4</sup> According to the Declaration of Ana Marques (Pl.'s Ex. B), Personal Folder Files ("PST files") are generated by a server during the ordinary course of e-mail creation, irrespective of whether Microsoft Outlook or Microsoft Exchange software is used. Each of the hundred of thousands of e-mail communications and the attachments bears a fingerprint identifiable by its date of creation, author, recipient(s), subject, body, attachments, and



which counsel received the documents from their clients. That may be, but that does not obviate the need for Defendants to produce these documents in a readable, usable format. To the extent that these documents were created or received by any of the Defendants in a readable format,<sup>5</sup> they must be produced for Plaintiff in a readable, usable format.

Second, Plaintiff asks the Court to require Defendants to release copies of the PST files underlying the hundreds of thousands of e-mails and accompanying attachments produced by Defendants, since this is the manner in which the e-mails were kept in the ordinary course of business and the PST files would facilitate Plaintiff's ability to index the documents and identify which attachments belong to which e-mails. According to Plaintiff, due to the software employed by Defendants, many of the underlying e-mails were combined into a single document without their accompanying attachments. Defendants offered to

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related information. This identifying information is the e-mail's PST file. This is the same identifying information which Plaintiff would use in creating a document index, which could then be used to sort, review, and analyze these documents. Marques Aff. ¶ 2.

<sup>5</sup> If, however, Defendants never possessed the document or computer data in a readable format (such as a computer document Defendants received that they did not have the supporting software to open), then that information should be communicated to Plaintiff and the document does not need to be re-produced.

provide Plaintiff with its "Metadata,"<sup>6</sup> at a cost of \$11,091.36, to help in this regard. Plaintiff maintains that this program will not solve the problem of the separated attachments and, in any event, Defendants should bear this expense since Rule 34(a) requires the production of "data compilations from which information can be obtained, translated, if necessary, by [Defendants] through detection devices into reasonably usable form." (Emphasis added). Defendants argue that re-producing the documents in PST format would require them to produce privileged documents, since they have no way of separating out documents from the "entire mailbox" of the producing party. They also express concern that PST files, which contain the documents in their "native" format, are susceptible to manipulation and editing.

Based on Defendants' representations that disclosure of these files would include privileged information, which they are unable to sort out, and would also involve the production of a "staggering" number of additional documents, the Court declines to order production of these PST files at this time. If Plaintiff's counsel can show the need for a specific PST file and a means to secure this without the production of privileged or

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<sup>6</sup> Ana Marques states that "Metadata" is a technical term for data used to describe other data. "Metadata" is automatically extracted from the PST files at the time they are imported into a litigation support database, such as Concordance used by Defendants. Marques Aff. ¶ 9.

irrelevant documents, the Court will reconsider this request.

Third, with respect to the attachments to e-mails, Defendants state that they have already provided Plaintiff with the information needed to match the e-mails with their attachments. If that is not the case, Defendants, at their expense, are ordered to provide Plaintiff with the information, data, or software needed to accomplish this. Defendants chose to provide the documents in the manner in which they were kept in the ordinary course of business. Attachments should have been produced with their corresponding e-mails. The Court appreciates the fact that the attachments were created with different software programs, but that does not provide Defendants with an excuse to produce the e-mails and attachments in a jumbled, disorganized fashion. See generally 7 Moore's Federal Practice §§ 37A.30[3], 37A.31[1].

### **Conclusion**

As set forth above, Plaintiff's Motion for Evidence Preclusion is DENIED. Plaintiff's Motion, in the alternative, to Compel a Supplemental Production is GRANTED to the extent set forth above. Plaintiff's Motion to Compel Additional Responses to its Requests for Production is DENIED. The Court reserves ruling on Plaintiff's request for attorneys' fees and monetary sanctions until the conclusion of this case.

SO ORDERED, this 6th day of February, 2006, at  
Bridgeport, Connecticut.

/s/ William I. Garfinkel  
WILLIAM I. GARFINKEL,  
United States Magistrate Judge